BUN LIT CHUN

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
KAMARDIN HASHIM J
[CRIMINAL APPEAL NO: 42-12-2011]
18 MARCH 2014

CRIMINAL PROCEDURE: *Sentence - Appeal against - Appellant found guilty of false trading and market rigging transactions - Mitigating factors - Consideration of - Public interest - Whether imprisonment sentence should not be given priority - Whether court should set aside imprisonment sentence - Whether fine affirmed - Securities Industry Act 1983, ss. 84(1), 88(B)*

The appellant together with another accused person was found guilty of committing false trading and market rigging transactions, an offence under s. 84(1) of the Securities Industry Act 1983 read together with s. 34 of the Penal Code and punishable under s. 88B of the Securities Industry Act 1983. They were alleged to have in furtherance of a common intention, created a misleading appearance of active trading of Suremax Group Berhad shares on a stock market, by indirectly being concerned in transactions of sale and purchase of Suremax Group Berhad shares that did not involve any change in the beneficial ownership of the said shares, executed through the central depository securities accounts. The appellant was sentenced to three months imprisonment with a fine of RM2 million and in default, to suffer a further six months of imprisonment. The appellant appealed against the said conviction and sentence. The appellant submitted that the custodial sentence imposed should be set aside and instead a minimum fine should be imposed instead. The respondent, however, contended that the offence committed by the appellant was a serious offence as market manipulation was an offence that struck at the fear and honest operation of the securities market, thus the sentence imposed on the appellant should not be disturbed.

Held (allowing appeal in part):

(1) The appellant was not the mastermind in the commission of the offence. The mastermind was the other two persons charged together with the appellant. Even though all of them

were charged together under common intention, nevertheless, the part played by the appellant was not vital as he was only a worker who received instructions from the other two perpetrators. While one of the accused persons received more rigorous sentence, the other accused person, the main culprit had the charge against him withdrawn by the prosecution and turned as a crown witness. These extenuating factors should be given due consideration and should reflect in the sentence imposed on the appellant. The appellant herein should be given some discount on the sentence that the court had imposed. (para 14)

(2) The appellant had no criminal records and was a first offender. These were important mitigating factors that the court should take into consideration. The appellant should be given a chance to be a good citizen and be more responsible to his family. Factors such as that the appellant had been divorced by the wife, that he was the sole breadwinner of his family, that he had taken care of his aged mother as well as his ex-mother in law together with his children, even though very personal to him, nevertheless should be considered as a good lesson for him not to commit similar offences or any other offence in the future. Public interest would be best served if the offender can be turned from criminal ways to an honest living. (para 15)

(3) The appellant had cooperated with the Securities Commission in their investigation in this case. Further, the appellant was adjudged a bankrupt in consequence of this case and did not profit from the offence charged. The cooperation given by the appellant should work in his favour. Likewise, the fact that he was a bankrupt should be considered when determining the amount of fine to be imposed on him in this case. However, based on the severity of the offence committed by the appellant, this court was not agreeable to reduce the fine of two million ringgit imposed. (para 16)

(4) It is crystal clear from reading the penalty section under s. 88B of the Securities Industry Act 1983 that imprisonment sentence is not given the priority. Instead, fine was given the first choice by Parliament in enacting the laws. There was no minimum term of imprisonment imposed by the legislature. That being so, the minimum term of imprisonment of a day jail sentence was mandatory. (para 18)

(5) Public interest was in no way better served by committing the appellant to prison. The primary purpose of punishment was reformatory and it was clear that the appellant had realised the fact that crime doesn't pay and had repented. This court thus set aside the three months' imprisonment sentence imposed by the trial judge and affirmed the two million ringgit fine to be paid in ten months' instalments of RM200,000 each with default clause of one month imprisonment for each unpaid instalment under s. 283 of the Criminal Procedure Code. (paras 19 & 20)

Case(s) referred to:
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Brown v. R [2006] 58 ACSR 290 ***(refd)***
Chua Li Hoon Matilda & Ors v. PP [2009] SGHC 116 ***(refd)***
Leong Ka Kong v. PP [1975] 1 LNS 86 HC ***(refd)***
Low Meng Chay v. PP [1993] 1 SLR 569 ***(refd)***
Mohd Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
PP v. Chin Chan Leong (W-09-184-2010) (Unreported) ***(refd)***
R v. Austin and R v. Manasseh [2001] 38 ACSR 271 ***(refd)***
R v. Kenneth John Ball [1951] 35 Cr App R 164 ***(refd)***
R v. Lloyd [1996] 19 ACSR 528 ***(refd)***
Zakariya Musa v. PP [1984] 1 LNS 93 HC ***(refd)***

Legislation referred to:
Capital Markets and Services Act 2007, s. 182
Criminal Procedure Code, s. 283
Penal Code, s. 34
Securities Industry Act 1983, ss. 84(1), 85, 86, 87, 87A, 88B

Corporations Law [AU], s. 998(1)
Securities Industry (Western Australia) Code [AU], s. 124
Securities Industry Act 1986 [Sin], s. 97(1)

For the appellant - Wong Kian Kheong (Wilson Lim with him); M/s Wong Kian Kheong
For the prosecution - Roz Mawar Rozain (Zul'aida Zulkifli & Munira Masood wth her); DPPs

Reported by Suhainah Wahiduddin

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JUDGMENT

Kamardin Hashim J:

[1] The appellant with two others were originally charged in the Kuala Lumpur Sessions Court with one amended principal charge and another with an amended alternative charge for offences under the Securities Industry Act 1983 (Act 280). The Act has since been repealed and replaced with the new Capital Markets and Services Act 2007 (Act 671) ("CMSA"). As for the amended principal charge, they were charged in furtherance of a common intention of them, for a misleading appearance of active trading of Suremax Group Berhad (Company No: 334228-K) ("Suremax") shares on a stock market, that is Bursa Malaysia Securities Berhad, through sale and purchase transactions of Suremax shares executed through the central depository securities accounts, which have the effect of raising the price of Suremax shares and therefore, committed an offence under s. 84(1) of the Securities Industry Act 1983 ("SIA") read together with s. 34 of the Penal Code ("PC"), punishable under s. 88B of the SIA.

[2] As for the amended alternative charge, they were charged in furtherance of common intention of them, for a misleading appearance of active trading of Suremax shares on a stock market, that is Bursa Malaysia Securities Berhad, by indirectly being concerned in transactions of sale and purchase of Suremax shares that do not involve any change in the beneficial ownership of the said shares, executed through the central depository securities accounts and thereby, committed an offence under s. 84(1) of the SIA read together with s. 34 of the PC, punishable under s. 88B of the SIA.

[3] At the lower court, after a lengthy trial which took some six years to conclude, the appellant together with another accused person were found guilty and convicted by the trial judge on the amended alternative charge. On conviction, the appellant was sentenced to three months imprisonment with a fine of RM2 million and in default, to suffer further six months imprisonment. The appellant had since filed an appeal to this court against the said conviction and sentence imposed by learned trial judge.

[4] I have heard the appellant's appeal and had dismissed his appeal against conviction. As regard to his appeal against sentence, I allowed his appeal partly, that is in respect of jail term

which was reduced to a day jail and affirming the sentence of fine imposed by learned trial judge. I allowed the fine of RM2 million to be paid by ten monthly instalments of RM200,000 each under the provision of s. 283 of the Criminal Procedure Code ("CPC"). In case of any default in the monthly instalment, warrant of commitment of one month imprisonment will be issued against the appellant for each and every defaulted instalment.

[5] Being dissatisfied with the order, the appellant now lodged a notice of appeal to the Appeal Court in respect of the sentence imposed. I now give my reasons for having done so.

[6] The amended alternative charge under which the appellant was convicted and sentenced, read as follows:

> That you, between 24 November 2004 and 22 March 2005 at Bursa Malaysia Securities Berhad, 14th Floor, Exchange Square, Bukit Kewangan, 50250 Kuala Lumpur, together with one Ng Chong Yeng (NRIC No. 660903-08-6161), in furtherance of a common intention of you all, created a misleading appearance of active trading of Suremax Group Berhad (Company No: 334228-K) shares on a stock market, that is Bursa Malaysia Securities Berhad, by indirectly being concerned in transactions of sale and purchase of Suremax Group Berhad shares that do not involve any change in the beneficial ownership of the said shares, executed through the central depository securities accounts listed in the Appendix to this charge, and you have thereby committed an offence under section 84(1) of the Securities Industry Act 1983 (Act 280) read together with section 34 of the Penal Code (Act 574), punishable under section 88B of the Securities Industry Act 1983.

[7] Learned counsel for the appellant, Mr Wong Kian Kheong submitted before me that custodial sentence imposed by learned trial judge should be set-aside and instead a minimum fine should be imposed instead. Further, learned counsel pray that the appellant be allowed to pay the fine by instalment as provided for under s. 283 of the CPC. In applying for non-custodial sentence and an appropriate fine, learned counsel argued based on the following reasons:

(a) There is overwhelming evidence that the other two accused persons charged together with the appellant were the master-mind in this case as found by the learned trial judge in her judgment;

(b) This is the appellant's first offence. He has not been charged, let alone, convicted for any offence prior to this case;

(c) The appellant had been adjudicated a bankrupt in November, 2008 and this court should consider in imposing minimal fine on the grounds that the appellant's dire financial position as a bankrupt and the fact that the appellant did not profit from this case. Instead, the appellant was made a bankrupt as a consequence of this case;

(d) Due to, among others, this case, the appellant's wife has divorced him;

(e) The appellant still has to support his aged mother-in-law despite of the divorce. Besides, he has to take care of his own aged mother as well as to provide for his two school-going children; and

(f) The appellant had turned over a new leaf and has not taken part in share trading since this case. It is clear that the appellant has shown genuine remorse and should be given an opportunity to be a responsible citizen and father to his two children.

[8] Learned counsel for the appellant refers to the following authorities to support his submission for the reduction of sentence imposed by learned trial judge:

(a) *Zakariya Musa v. Public Prosecutor* [1984] 1 LNS 93; [1985] 2 MLJ 221 where Gunn Chit Tuan J decided that if it was really necessary to impose a fine, the trial judge should have taken into consideration, *inter alia*, the financial circumstances of the appellant, the profit arising from the offence, the value of the subject-matter and the amount of injury, if any, inflicted.

(b) *Low Meng Chay v. PP* [1993] 1 SLR 569 where Yong Pung How CJ of Singapore of the view that when it is unambiguously clear that a defendant cannot pay a fine, realistic and reasonable though it may be, the fine should not be imposed even though the court would have preferred to impose a fine rather than a short term of imprisonment. Learned judge further said that, if it is clear that the appellant was unable to pay any fine commensurate with the gravity of his offences so it would be invidious to persist in imposing one.

(c) *R v. Lloyd* [1996] 19 ACSR 528, conviction under s. 124 of the Australian Securities (Western Australia) Code by reason of having been knowingly involved in creating a false appearance in respect of the price of shares in Paragon NL, a publicly listed company. A trial judge imposed a fine of AUD22,500. On appeal, the Supreme Court of Western Australia increased the fine to USD50,000 with no custodial sentence.

(d) *R v. Austin and R v. Manasseh* [2001] 38 ACSR 271, both the accused had been convicted of creating a false or misleading appearance of active trading in shares in Diamond Rose NL on the Australian Stock Exchange, an offence under s. 998(1) of the Corporations Law and s. 124 of the Securities Industry (Western Australia) Code. Supreme Court of New South Wales released both the accused on good behaviour for three years. Bell J commented that "Crimes of this nature will frequently be committed by persons of good character and to this extent; good character may assume a lesser significance in the sentencing process. That did not mean that each defendant's good character did not entitle him to a claim upon the court for leniency."

(e) *Brown v. R* [2006] 58 ACSR 290, conviction under s. 998(1) of the Corporations Law where trial judge imposed a fine of AUD30,000 without any custodial sentence. On appeal, Supreme Court of Western Australia affirmed the sentence imposed by the trial judge. In dismissing the appeal, Wheeler JA had this to say, *albeit*, *in extensor*:

> [23] In order to consider the other particulars, it is necessary to mention the appellant's personal circumstances. At the time of sentencing, the appellant was 34 years of age. He had a good education, family support, and had participated in sporting activities. He did not have significant assets. He was a director of a number of investment companies and a beneficiary of discretionary and other trusts. Information about the assets of the trusts, or about any income derived from the directorships, was apparently not made available to her Honour. It was, however, asserted on his behalf that he had incurred debts as a result of the legal fees required for his trial, that he had no capacity to pay a fine, and that any fine imposed would have to be paid by his mother.

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[24] He had no prior offences, save for one driving conviction which resulted in a spent conviction. It was submitted that he was embarrassed by the considerable publicity attendant upon his case, that he had co-operated "entirely" with ASIC in their enquiries, that his reputation would be substantially affected by the conviction, and that he would, as a result of conviction, be disqualified from practicing as a company secretary or director, thereby losing sources of income otherwise available to him.

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[25] The submissions in relation to his personal circumstances can be accepted, but with these observations. The co-operation with the authorities by the appellant consisted of informing them of a computer that they might not otherwise have discovered, which did not lead to any evidence in addition to that tendered at trial. It consisted also of making certain formal admissions, which no doubt shortened the length of the trial. Those formal admissions seem largely to relate to matters which could otherwise have been proved (somewhat laboriously, no doubt) by reference to documentary material. The shortening of the trial was, of course, a public benefit, but also saved the appellant some legal fees.

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[26] It is submitted on behalf of the appellant that the offence could not be committed in the same way again, and therefore the need for general deterrence was reduced. The offence could not be committed in precisely the same way again, since it is now the case that the relevant terminal screens seen by broking houses do not display the number of the broking firm next to each order. However, the use of the three different brokers, who unwittingly placed leapfrogging bids, is behavior which could be readily replicated. In any event, I would understand the need for general deterrence as extending more broadly than merely deterring others from committing offences in precisely the same way as the appellant; rather, the need is to deter others from engaging in market-rigging behavior.

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[27] It may be accepted that the appellant had previously good antecedents and that the effect of his behavior was limited to the trader who gave evidence, and to the brokers he employed. There was, in this case of these shares, no "crash" and no wider effect upon the market. That is, no doubt, why her Honour chose to impose a fine, rather than imprisoning the appellant.

I

> [28] However, I am unable to accept that the quantum of the fine was unduly severe. Indeed, it seems to me that it was lenient. A person who, as the appellant did, deliberately and dishonestly engages in behavior which he expects will mislead the market, is behaving in a manner which has the potential adversely to affect many members of the community and has the potential to undermine confidence in the share market, which is an important institution in the functioning of the economy. Further, it is, as her Honour observed, behavior which is difficult to detect. There are some similarities with fraud upon the revenue in those respects. In my view, it would have been open to her Honour to have imposed a term of imprisonment, although the term would be of relatively short duration, having regard to the mitigating factors to which I have already referred. The fine imposed, which was three-eights of the maximum fine available, appears to me to have been at the very bottom of any appropriate sentencing range for the conduct of the appellant. Ground 2 therefore cannot be made out.
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> [29] I would dismiss this appeal.

(f) *Chua Li Hoon Matilda & Ors v. PP* [2009] SGHC 116, the second appellant was convicted on the charge of creating a false or misleading appearance of the price of WizOffice shares under s. 97(1) of the Securities Industry Act 1986 (Cap 289). The second appellant was fined SGD150,000, and with no custodial sentence.

[9] Mr Wong Kian Kheong, learned counsel for the appellant, finally submitted that learned trial judge failed to direct her mind to the provisions of s. 88B of the SIA which provides the penalty and to provisions as to sentence of fine under s. 283 of the CPC. Section 88B provides that "A person who contravenes or fails to comply with ss. 84, 85, 86, 87, 87A or 88 commits an offence and is liable on conviction to a fine of not less than one million ringgit and to imprisonment for a term not exceeding ten years". Learned counsel argued that imprisonment is not mandatory as the section begins with the words "a fine of not less than one million ringgit" upon conviction. That shows the intention of Parliament at that time not to impose mandatory imprisonment to offenders convicted under the various sections mentioned under punishment section of s. 88B of the SIA. Learned counsel makes comparisons with the present applicable laws, that is, CMSA in which s. 182

provides penalty for false trading and market rigging transaction shall be punished on conviction to imprisonment for a term not exceeding ten years and to a fine of not less than one million ringgit. The priority now under CMSA is imprisonment which is mandatory to be imposed on the offenders committing such offences. I agree with learned counsel on this point.

[10] Now, s. 283 of the CPC. Learned counsel submitted that the trial judge did not address her mind to the provisions when she imposed six months imprisonment if the appellant failed to raise the amount of two million ringgit. Due to the big amount coupled with the bankruptcy status of the appellant, it was argued that learned trial judge should use her discretion to allow the amount of fine of two million ringgit to be paid by instalment or allow time for the payment of the said fine.

[11] Learned counsel for the respondent in her reply contended that the offence committed by the appellant is a serious offence and public interest warranted deterrent sentence should be meted out. It was submitted that market manipulation is an offence that strikes at the fair and honest operation of the securities market. It is in the interest of the public that the securities market should be real and genuine, free from manipulation. Therefore, learned Deputy Public Prosecutor's submitted that the imposition of fine alone is insufficient. The imposition of three months imprisonment and a fine of two million on the appellant is not manifestly excessive and should not be disturbed by the higher court. Counsel for the respondent refers to recent decision by the Appeal Court in the case of *PP v. Chin Chan Leong* (W-09-184-2010), where the court had imposed a sentence of RM1.3 million and 12 months imprisonment to the accused when he had pleaded guilty for a similar offence under s. 84(1) of the SIA.

[12] The principle governing sentence in a criminal case is well settled. An appellate court should be slow to interfere or disturb the sentence passed by the lower court unless it is manifestly wrong in the sense of being illegal or of being unsuitable to proved facts and circumstances. The mere fact that another court might pass a different sentence is not a reason for appellate court interference if the trial court applies the correct principles in the assessment of the sentence (see *Leong Ka Kong v. Public Prosecutor* [1975] 1 LNS 86; [1976] 2 MLJ 21).

[13] One of the instances where appellate court could disturb the sentenced imposed by the court below is when the trial judge has proceeded on wrong principles of sentencing and there is a failure to consider the extenuating facts and circumstances of the given case. As Raja Azlan Shah Ag LP (as His Majesty then was) in *Bhandulananda Jayatilaake v. Public Prosecutor* [1981] 1 LNS 139; [1982] 1 MLJ 83 said:

> Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusion (see *Jamieson v. Jamieson*). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences and the possibility or even the probability, that another court would have imposed a different sentence, is not sufficient, per se, to warrant this court's interference.
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> For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorized or extraneous or irrelevant exercise of discretion.

[14] A sentence must give sufficient discount for all extenuating circumstances pertaining to the degree of culpability or criminality involved which must be necessarily varied from case to case apart from other mitigating factors (*Mohd Abdullah Ang Swee Kang v. Public Prosecutor* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC). With that principle in mind, I am of the view that the appellant in this case should be given some discount on the sentence that the court should imposed. It is undisputed facts that the appellant was not the mastermind in the commission of the offence. The mastermind is the other two persons charged together with the appellant. Even though all of them were charged together under common intention of them all, but nevertheless, the part played by the appellant was not vital as he is only a worker who received instructions from the other two perpetrators. While one of the accused received more rigorous sentence, the other accused person, the main culprit had the charged against him withdrawn by the prosecution and turned as a crown witness. These extenuating factors in this case should be given due consideration and should reflect in the sentence imposed on the appellant.

[15] Other mitigating factors put forward by learned counsel for the appellant likewise should not be ignored in passing appropriate sentence. Factors that the appellant had no criminal records and a first offender as confirmed by the prosecution, is also equally important mitigating factor that the court should take into consideration. In this situation, the appellant should be given a chance to turn himself into an honest living. He should be given a chance to improve himself to be a good citizen and be more responsible to his family. Factors such as that the appellant had divorced by the wife, that he is a sole breadwinner of his family, that he has to take care his aged mother as well as his ex-mother-in-law together with his children, even though very personal to him, nevertheless should be considered as a good lesson for him not to commit similar offence or any other offence in the future. Public interest will be best served if the offender can be turn from criminal ways to an honest living (*R v. Kenneth John Ball* [1951] 35 Cr App R 164).

[16] Another factor taken into consideration by this court apart from the facts that the appellant's cooperation with the Security Commission in their investigation in this case, the fact that the appellant was an un-discharged bankrupt. He was adjudged bankrupt in consequence of this case. He did not profit from the offence charged. The cooperation given by the appellant should works in his favour. Likewise, the fact that he is a bankrupt should be considered when determining the amount of fine to be imposed on him in this case. But, based on the severity of the offence committed by the appellant in this case, this court is not agreeable to reduce the fine of two million ringgit imposed by learned trial judge.

[17] Section 88B of the SIA provides penalty for offences of market manipulation, read as follows:

> 88B. Penalty for Offence under Division 1
>
> A person who contravenes or fails to comply with section 84, 85, 86, 87, 87A or 88 commits an offence and is liable on conviction to a fine of not less than one million ringgit and to imprisonment for a term not exceeding ten years.

[18] It is crystal clear from reading the penalty section above that imprisonment sentence is not given the priority. Instead, fine was given the first choice by Parliament in enacting the laws. There is no minimum term of imprisonment imposed by the legislature. That

being so, the minimum term of imprisonment will be a day jail sentence is mandatory. Learned counsel for the respondent's submission that longer term of imprisonment should be imposed based on *Chin Chan Leong (supra)* decision is not of much helpful as there is no particulars in respect of facts and circumstances of the case had been made known to this court. There were no written grounds of judgment of the Court of Appeal as far yet for this court to follow the footpath taken by the higher court in imposing 12 months imprisonment on the said offender.

[19] Considering all the facts and the extenuating circumstances of the appellant's case, I have come to the conclusion that the public interest is in no way better served by committing the appellant to prison. Public interest is best served if the appellant can be turn into an honest living. The primary purpose of punishment is reformatory and it is clear that the appellant has realised the fact that crime don't pay and he has repented and would not commit the same mistake again.

[20] Based on the reasons above-stated, I allow partly appellant appeal against sentence. I set-aside the three months imprisonment sentence imposed by learned trial judge and affirmed the two million ringgit fine. I make a further order that the fine to be paid in ten months instalments of RM200,000 each with default clause of one month imprisonment for each unpaid instalment under s. 283 of the CPC.